APPENDIX A

Case: 18-50386, 11/25/2019, ID: 11510456, DktEntry: 39-1, Page 1 of 5

NOT FOR PUBLICATION

FILED

NOV 25 2019

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. RAMON VALENCIA-CRUZ, Defendant-Appellant.	No. 18-50386 D.C. No. 3:18-cr-02711-LAB-1 MEMORANDUM*

Appeal from the United States District Court
for the Southern District of California
Larry A. Burns, District Judge, Presiding

Argued and Submitted November 8, 2019
Pasadena, California

Before: FARRIS and McKEOWN, Circuit Judges, and KENDALL,** District Judge.

Ramon Valencia-Cruz was found guilty of attempted illegal reentry, in violation of 8 U.S.C. § 1326. He appeals the denial of his motion for judgment of acquittal and the district court's sentence, which included a term of supervised

---

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Virginia M. Kendall, United States District Judge for the Northern District of Illinois, sitting by designation.

release. We review de novo a district court's decision to deny a motion for judgment of acquittal, *United States v. Christensen,* 828 F.3d 763, 780 (9th Cir. 2015), and review a district court's sentence under an abuse of discretion standard. *Gall v. United States,* 552 U.S. 38, 51 (2007). We find that a rational trier of fact could have found the essential elements of 8 U.S.C. § 1326 beyond a reasonable doubt and that the district court did not abuse its discretion in choosing to impose a within guideline term of supervised release.

Ramon Valencia-Cruz is a Mexican national with a significant history of deportations and reentries to the United States. Most recently, Valencia was arrested in January 2018 at the San Ysidro port of entry where he presented a facially valid lawful permanent resident card. Though his LPR card was facially valid, Valencia did not have legal authority to enter the United States based on his multiple prior removals. Valencia pleaded not guilty and proceeded to trial. At the close of evidence, Valencia moved for a judgment of acquittal, arguing that he could not possibly be found guilty as a matter of law of attempted illegal reentry because he followed the proper procedures for admission by attempting to enter through a designated port of entry. In June 2018, Valencia was convicted of attempted illegal reentry and sentenced to 27 months in prison and a three-year term of supervised release.

For an individual to be found guilty of attempted illegal reentry, the

government must show "'(1) the defendant had the purpose, i.e., conscious desire, to reenter the United States without the express consent of the Attorney General; (2) the defendant committed an overt act that was a substantial step towards reentering without that consent; (3) the defendant was not a citizen of the United States; (4) the defendant had previously been lawfully denied admission, excluded, deported or removed from the United States; and (5) the Attorney General had not consented to the defendant's attempted reentry.'" *United States v. Castillo-Mendez,* 868 F.3d 830, 836 (9th Cir. 2017) (quoting *United States v. Gracidas-Ulibarry,* 231 F.3d 1188, 1196 (9th Cir. 2000)).

Valencia argues that an alien, like himself, who attempts to enter in a procedurally proper way (e.g., entering through the designated pedestrian lane with a facially valid LPR card), cannot be said to have taken a substantial step towards making an illegal reentry. Such a position is inconsistent with the statute and this Court's precedent. A defendant's overt act or substantial step need not take the form of some nefarious or improper action to be considered in violation of § 1326. *United States v. Leos-Maldonado,* 302 F.3d 1061, 1063 (9th Cir. 2002) ("It matters not whether the defendant's overt act takes the form of a surreptitious border crossing or a misrepresentation of legal status."). On appeal, we need only ask whether, after viewing all evidence in a light most favorable to the government, a rational trier of fact could have found that the government met all the essential

elements of § 1326 beyond a reasonable doubt. *Christensen,* 828 F.3d at 780.

Here, the government presented substantial evidence to support an affirmative finding for each element of attempted illegal reentry. If ever there was an alien on notice that he had no lawful right to reenter the United States, it was Valencia. He had been removed from the United States on six occasions. Upon those removals, he signed multiple sworn statements attesting to the fact that he did not have permission to reenter the country without the consent of the Attorney General. At argument, Appellant's counsel suggested that, notwithstanding his prior removals and concessions that he had no legal right to reenter, his attempted reentry was proper on this occasion because he could have sought consent to enter at the border facility. The record below belies such an argument. When Valencia approached the border official, he did not inquire as to the validity of his LPR card or ask permission to enter. Rather, he unequivocally stated he was going to Las Vegas and placed a bottle of tequila on the counter. Valencia had no intention of discussing his immigration status and seeking consent to enter. He instead was trying once again to use the LPR card he used in the past, which led to his previous deportation, to enter and head to his ultimate destination—Las Vegas. Accordingly, we affirm the district court's denial of Valencia's motion for a judgment of acquittal.

Valencia's second issue on appeal is whether the district court abused its

discretion by choosing to impose the maximum term of supervised release. Having been found guilty of attempted illegal reentry, Valencia faced a guideline range of one to three years of supervised release. USSG § 5D1.1(a)(2). The district court chose to impose the maximum term of supervised release. In doing so, the district court explicitly recognized that Valencia had a significant history of removals and yet repeatedly chose to reenter the country without consent. The three-year term of supervised release represents a within-guideline sentence and is entirely reasonable given the recidivist history and personal characteristics of Valencia. *United States v. Valdavinos-Torres,* 704 F.3d 679, 693 (9th Cir. 2012). Therefore, we also affirm the district court's sentence.

AFFIRMED.

APPENDIX B

Effective: May 27, 2010

United States Code Annotated Currentness
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part II. Criminal Procedure
Chapter 227. Sentences (Refs & Annos)
Subchapter A. General Provisions (Refs & Annos)
§ 3553. Imposition of a sentence

(a) Factors to be considered in imposing a sentence.--The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider--

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed--

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for--

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines--

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code,

subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement--

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced. [FN1]

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

(b) Application of guidelines in imposing a sentence.--

(1) In general.--Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

(2) Child crimes and sexual offenses.--

(A) [FN2] Sentencing.--In sentencing a defendant convicted of an offense under section 1201 involving a minor victim, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117, the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless--

(i) the court finds that there exists an aggravating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence greater than that described;

(ii) the court finds that there exists a mitigating circumstance of a kind or to a degree, that--

(I) has been affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements issued under section 994(a) of title 28, taking account of any amendments to such sentencing guidelines or policy statements by Congress;

(II) has not been taken into consideration by the Sentencing Commission in formulating the guidelines; and

(III) should result in a sentence different from that described; or

(iii) the court finds, on motion of the Government, that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense and that this assistance established a mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence lower than that described.

In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission, together with any amendments thereto by act of Congress. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission, together with any amendments to such guidelines or policy statements by act of Congress.

(c) Statement of reasons for imposing a sentence.--The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence--

(1) is of the kind, and within the range, described in subsection (a)(4) and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in a statement of reasons form issued under section 994(w)(1)(B) of title 28, except to the extent that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied upon the content of such statements.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons, together with the order of judgment and commitment, to the Probation System and to the Sentencing Commission,, [FN3] and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

(d) Presentence procedure for an order of notice.--Prior to imposing an order of notice pursuant to section 3555, the court shall give notice to the defendant and the Government that it is considering imposing such an order. Upon motion of the defendant or the Government, or on its own motion, the court shall--

(1) permit the defendant and the Government to submit affidavits and written memoranda addressing matters relevant to the imposition of such an order;

(2) afford counsel an opportunity in open court to address orally the appropriateness of the imposition of such an order; and

(3) include in its statement of reasons pursuant to subsection (c) specific reasons underlying its determinations regarding the nature of such an order.

Upon motion of the defendant or the Government, or on its own motion, the court may in its discretion employ any additional procedures that it concludes will not unduly complicate or prolong the sentencing process.

(e) Limited authority to impose a sentence below a statutory minimum.--Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

(f) Limitation on applicability of statutory minimums in certain cases.--Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. 841, 844, 846) or section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 960, 963), the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that--

(1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;

(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(3) the offense did not result in death or serious bodily injury to any person;

(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and

(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

CREDIT(S)

(Added Pub.L. 98-473, Title II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1989; amended Pub.L. 99-570, Title I, § 1007(a), Oct. 27, 1986, 100 Stat. 3207-7; Pub.L. 99-646, §§ 8(a), 9(a), 80(a), 81(a), Nov. 10, 1986, 100 Stat. 3593, 3619; Pub.L. 100-182, §§ 3, 16(a), 17, Dec. 7, 1987, 101 Stat. 1266, 1269, 1270; Pub.L. 100-690, Title VII, § 7102, Nov. 18, 1988, 102 Stat. 4416; Pub.L. 103-322, Title VIII, § 80001(a), Title XXVIII, § 280001, Sept. 13, 1994, 108 Stat. 1985, 2095; Pub.L. 104-294, Title VI, § 601(b)(5), (6), (h), Oct. 11, 1996, 110 Stat. 3499, 3500; Pub.L. 107-273, Div. B, Title IV, § 4002(a)(8), Nov. 2, 2002, 116 Stat. 1807; Pub.L. 108-21, Title IV, § 401(a), (c), (j)(5), Apr. 30, 2003, 117 Stat. 667, 669, 673; Pub.L. 111-174, § 4, May 27, 2010, 124 Stat. 1216.)

[FN1] So in original. The period probably should be a semicolon.

[FN2] So in original. No subpar. (B) has been enacted.

[FN3] So in original. The second comma probably should not appear.

VALIDITY

<Mandatory aspect of subsec. (b)(1) of this section held unconstitutional by United States v. Booker, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005).>

Current through P.L. 113-74 approved 1-16-14